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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. NICOLAS CESAREO, Defendant.	Criminal Case No. 08CR0201-W HEARING DATE: June 23, 2008 TIME: 2:00 p.m. UNITED STATES' SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTIONS: (1) DISMISS DUE TO INVALID DEPORTATION. TOGETHER WITH STATEMENT OF FACTS, MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and Christopher M. Alexander, Assistant United States Attorney, and hereby files its Supplemental Response and Opposition to Defendant's above-referenced motion. This Supplemental Response and Opposition is based upon the files and records of the case together with the attached statement of facts and memorandum of points and authorities.

I

STATEMENT OF THE CASE

On January 23, 2007, a federal grand jury in the Southern District of California returned an Indictment charging Defendant Nicolas Cesareo ("Defendant") with being a deported alien attempting to enter the United States after deportation in violation of 8 U.S.C. § 1326. Defendant was arraigned on the Indictment and entered a not guilty plea. The Court set a motion hearing date for February 11, 2008.

On January 29, 2008, Defendant filed a motion to compel discovery and for leave to file further motions. The United States responded. On April 29, 2008, Defendant filed a motion to dismiss due to an invalid deportation. The United States responded. On June 13, 2008, Defendant filed a reply. On June 16, 2008, the Court continued the matter. The United States now responds to Defendant's reply.

II

DEFENDANT'S CRIMINAL AND IMMIGRATION HISTORY

Defendant's criminal history includes a conviction for robbery on July 11, 2006. He received a total of two years for this conviction.

Defendant was ordered deported on September 22, 2005 and was most recently removed on September 28, 2007.

III

MOTION TO DISMISS SHOULD BE DENIED

In his reply, Defendant argues three things (1) the immigration judge did not make a determination that Defendant's waiver was knowing, intelligent, and voluntary; (2) Defendant did not knowingly, intelligently, and voluntarily enter into the Stipulation; and (3) Defendant was eligible for voluntary departure.

A. THE IMMIGRATION JUDGE NECESSARILY FOUND DEFENDANT'S WAIVER IN THE STIPULATION WAS PROPER

First, as noted in the United States' Response, the Order provides that "[t]he respondent, representing himself, has submitted as statement wherein he waives a personal hearing before the Immigrations Judge. . . ." (Def.'s Ex. A.) The "statement" to which the Order applies is a Stipulation in which Defendant agrees that his waiver is voluntary, knowing, and intelligent. (Def.'s Ex. B.) There were no other facts before the Immigration Judge. The plain language of the Order finds waiver. Undoubtedly, the Immigration Judge was aware that for the waiver to be a valid, it must be voluntary, knowing, and intelligent. Even if not explicit, it is implicit in the Order.

B. THE FACTS ALLEGED BY DEFENDANT DO NOT MAKE HIS WAIVER IN THE STIPULATION INVALID

Second, as noted in the United States' Response, the Stipulation executed by Defendant detailed that its entry was knowing, intelligent, and voluntary. Namely, the Stipulation includes:

(1) an admission that all factual allegations contained in the charging document are true and correct, at **paragraph 4** ("I admit that all of the factual allegations contained in the NTA are true and correct.");

(2) a concession of deportability or inadmissibility as charged, at **paragraph 4** ("I also agree that I am inadmissible or deportable and will be removed fromt he United States based on the charges(s) on the NTA.");

(3) a statement that Defendant is making no application for relief under the Immigration and Nationality Act, at **paragraph 3(B)** ("I understand that, if I wish to request any relief from removal, I should request a hearing before an Immigration Judge. Such relief may include, but is not limited to, voluntary departure, asylum, withholding or [sic] removal, relief under Article 3 of the Convention Against Torture, adjustment of status, change of status, suspension or cancellation of removal, registry, and any waivers of removabilty. I do not want to apply for any relief from removal for which I may be eligible");

(4) a designation of a country for removal, at **paragraph 5** ("I choose Mexico as the country to be designated for removal.");

(5) a concession to the introduction of the written stipulation as an exhibit to the Record of Proceeding, at **paragraph 7** ("I understand and agree that this written stipulation will be made an exhibit to the Record of the Proceedings for the Immigration Judge to consider.");

(6) a statement that Defendant understands the consequences of the

stipulated request and that he is entering the request voluntarily, knowingly and intelligently, at **paragraph 10** ("NC I have read or ___ I have had read to me in a language I understand this entire stipulation. I fully understand its consequences. I submit this request for removal voluntarily, knowingly and intelligently. I realize that by signing the stipulation, I will be removed from the United States.");

(7) a statement that Defendant will accept a written order for his deportation, exclusion or removal as a final disposition of the proceedings, at **paragraph 8** ("I understand and agree to accept a written order for my removal as a final disposition of these proceedings.."); and

(8) a waiver of appeal of the written order of deportation or removal, also at **paragraph 8** ("I waive my right to appeal the written order of the Immigration Judge").

(Def.'s Ex. B.)

Defendant claims that his waiver was invalid because "Mr. Cesareo made an unconsidered and uniformed appellate waiver." (Def.'s Mot. at 11.) However, official records which show on their face a valid waiver of rights in connection with a deportation proceeding are "presumed to be correct." United States v. Galicia-Gonzalez, 997 F.2d 602, 603-04 (9th Cir. 1993) (per curiam) (citing United States v. Carroll, 932 F.2d 823, 825 (9th Cir. 1991)). Thus, where the United States introduces official records which on their face show a valid waiver of rights in connection with a deportation proceeding, the burden shifts to the defendant to come forward with evidence then tending to prove the waiver was invalid. Id. at 603.

Akin to Galicia-Gonzalez, Defendant has not presented any evidence to show that the waiver was invalid. Even the declaration does not provide evidence to show the Stipulation was involuntary. Defendant was given "a form and asked [] to read it and sign." (Def.'s Ex. F.) The Stipulation to which Defendant agreed states that he read and understood the Stipulation. Now, after he has been charged, he asserts that "I did not understand the significance of my rights and the consequences of my signature on the document." (Def.'s Ex. F.)

Even if he did not understand the later significance of the Stipulation, it does not matter. By way of analogy, in the area of appellate waivers, the Ninth Circuit has made clear that a defendant's waiver is not invalidated by failure to foresee future claims. United States v. Johnson, 67 F.3d 200, 202-03 (9th Cir. 1995). The Ninth Circuit has also rejected the contention that a plea is rendered infirm because the defendant did not know exactly what issues would arise after sentencing. United States v. Navarro-Botello, 912 F.2d 318, 320 (9th Cir. 1990). "Just because the choice looks different to [the defendant] with the benefit of hindsight does not make the choice involuntary." Id.; see also United States v. Cortez-Arias, 425 F.3d 547, 548 (9th Cir. 2005) (ruling a defendant may not renege even when a later clarification in law shows he has a claim).

Moreover, Defendant's claim that "I believed that I did not have any relief from deportation" is not supported by the Notice to Appear or Stipulation. The Notice to Appear provides: "You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily." (Def.'s Ex. C.) The Notice to Appear also provides: "If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence. . . ." (Def.'s Ex. C.) As noted previously, the Stipulation that he signed specifically stated that he may be entitled to relief. There are less than 30 days between the date of the Notice to Appear (August 31, 2005), the Stipulation (September 21, 2005), and Order of the Immigration Judge (September 22, 2005). He was removed to Mexico on September 23, 2005 at San Ysidro. In the declaration, Defendant never states that his rights were improperly explained to him, or he was somehow coerced into waiving his rights. Absent that such a showing, he cannot satisfy his burden and the waiver is presumed to be valid.

C. DEFENDANT HAS NOT SHOWN THAT HE WAS ELIGIBLE FOR VOLUNTARY DEPARTURE

Third, Defendant claims that since he had not yet been convicted of an aggravated felony at the time of his removal, it leaves open an avenue of voluntary departure.[1/] (Def.'s Mot. at 9.) However,

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[1/] The Stipulation provided Defendant the opportunity to apply for voluntary departure even though he was not eligible for relief. Defendant refused to pursue it. If he had pursued it, an immigration judge's order denying voluntary departure would not be subject to review on direct appeal. Alvarez-Santos v. INS, 332 F.3d 1245, 1255 (9th Cir. 2003) ("The INA provides that 'no court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure . . . .' § 1229c(f)."). Similarly, this finding should not be subject to collateral attack.

Moreover, for any collateral attack, there must be a due process violation. The alleged violation is the Immigration Judge's failure to advise Defendant that he was eligible for voluntary departure. However, the Ninth Circuit has "held that aliens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection." Tovar-Landin v. Ashcroft, 361 F.3d 1164, Defendant was ineligible for voluntary departure under 8 U.S.C. § 1229a(a) or (b).

Under 8 U.S.C. § 1229c(a)(1), "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 240 [8 USCS § 1229a] or prior to the completion of such proceedings, if the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4)(B) [8 USCS § 1227(a)(2)(A)(iii) or 1227(a)(4)(B)]." The Attorney General served a Notice to Appear on Defendant placing him "in removal proceedings under section 240 of the Immigration and Nationality Act." (Def.'s Ex. C.) Last week, the Ninth Circuit addressed a similar voluntary departure claim under a different statute. See United States v. Becerril-Lopez, 2008 U.S. App. LEXIS 12518 (9th Cir. June 12, 2008). In Becerril-Lopez, the defendant claimed that he was entitled to be advised of "pre-hearing" voluntary departure under § 242 of the INA, codified at 8 U.S.C. § 1252(b) (1995). As it existed in 1995, this provision gave the Attorney General discretion to waive deportation hearings for aliens who depart voluntarily "in lieu of initiating deportation proceedings." Id. at *6. The appellate court held that "[b]ecause pre-hearing voluntary departure would have been granted, if at all, before the hearing, we cannot hold that the IJ violated Becerril's rights by failing to mention it at the hearing itself." Id. at *7. Thus, when the immigration judge held a hearing for Defendant (regardless of his presence), the Attorney General elected not to grant voluntary departure in lieu of proceedings.

So, the next step is whether Defendant was eligible for voluntary departure "prior to the competition of such proceedings" under 8 U.S.C. § 1229c(a)(1). Through the Assistant Chief Counsel, the Attorney General had expressly stated that it "concurs with the request for the Immigration Judge to issue a stipulated removal order without holding a hearing." (Def.'s Ex. B.) As a result, he was not eligible to receive any relief from the Attorney General.

Since the Attorney General did not granted voluntary departure, Defendant's the final refuge was to be granted voluntary departure by the immigration judge. Under 8 U.S.C. § 1229c(b)(1),

The Attorney General may permit an alien voluntarily to depart the United States at the

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1166 (9th Cir. 2004); but see Ubaldo-Figueroa, 364 F.3d at 1050 (holding that it is a due process violation for an immigration judge to fail to inform an alien of his or her ability to apply for relief from removal). So, Defendant is arguing he has a fundamental right to be advised of relief he has no fundamental right to receive.

> alien's own expense if, at the conclusion of a proceeding under section 240 [8 USCS § 1229a], the immigration judge enters an order granting voluntary departure in lieu of removal and finds that--
> (A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 239(a) [8 USCS § 1229(a)];
> (B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;
> (C) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4) [8 USCS § 1227(a)(2)(A)(iii) or 1227(a)(4)]; and
> (D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

8 U.S.C. § 1229c(b)(1); see also Lopez v. INS, 184 F.3d 1097, 1100 (9th Cir. 1999); Tovar-Landin v. Ashcroft, 361 F.3d 1164, 1167 (9th Cir. 2004).

Here, Defendant failed to meet all four requirements for eligibility. Defendant offered no evidence to the Immigration Judge (or even now) as to any of these four requirements.

Next, under 8 U.S.C. § 1229c(c), aliens previously removed after being found to be inadmissible under section 8 U.S.C. § 1182(a)(6)(A) are not eligible "to voluntarily depart under this section." In other words, they are not eligible for any form of voluntary departure. Under section 1182(a)(6)(A), an alien present in the United States without being admitted, or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General is inadmissible.

Here, the Notice to Appear alleges that Defendant has not been admitted or paroled into the United States. (Def.'s Ex. C.) In the Stipulation, Defendant conceded that he had not been admitted or paroled into the United States. (Def.'s Ex. B.) Defendant offered no evidence to the Immigration Judge (or even now) that he had not been previously removed. Thus, since Defendant was inadmissible under section 1182(a)(6)(A), Defendant was not eligible for voluntary departure.

Moreover, under 8 U.S.C. § 1229c(e), "[t]he Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens." The stipulated removal process set forth at 8 C.F.R. § 1003.25(b) limits eligibility for any relief under Title 8 including voluntary departure. Defendant followed the stipulated removal process and failed to pursue voluntary departure by requesting an immigration hearing. Thus, Defendant cannot show a due process violation.

Finally, Defendant was not present for the proceedings to be advised of or to apply for any form of voluntary departure. Under 8 U.S.C. § 1229a(b)(5)(A), "Any alien who, after written notice required under paragraph (1) or (2) of section 239(a) [8 USCS § 1229(a)] has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2))." (emphasis added.) As his signature on the document and the Stipulation show, Defendant was served the Notice to Appear. (Def.'s Ex. C.) Defendant did not appear. (Def.'s Ex. A.) In the Stipulation, Defendant admitted he was inadmissible as an alien present without inspection. (Def.'s Ex. B.) The Notice to Appear and Stipulation establish by clear and convincing evidence that he was inadmissible as an alien present without inspection. See 8 U.S.C. §§ 1182(a)(6)(A)(i) (defining inadmissible as being present without inspection) and 1229a(e)(2) (defining inadmissible by reference to § 1182). Therefore, the Immigration Judge was without discretion to grant voluntary departure.

D. ORTIZ-LOPEZ DOES NOT PROVIDE THE RELIEF DEFENDANT SEEKS

Defendant cites United States v. Ortiz-Lopez, 385 F.3d. 1202 , 1203 (9th Cir. 2004) as authority to dismiss the Indictment. However, Defendant fails to highlight some the important distinctions. First, "Ortiz-Lopez will have met all of the requirements for a successful collateral attack on his § 1326 conviction – provided he can show that he could in fact have received voluntary departure under § 1229c(a) at the time of his removal hearing." Here, Defendant has made no such showing. Second, unlike Ortiz-Lopez who was at his hearing, Defendant elected not to attend. Third, the Ninth Circuit did not dismiss the indictment as Defendant has requested. In other words, Ortiz-Lopez' 1326(d) collateral attack was not successful even though the appellate court held that he was eligible for voluntary departure. Rather, it remanded the case to the district court to determine whether Ortiz-Lopez suffered prejudice. Id. As demonstrated below, Defendant suffered no prejudice.

E. DEFENDANT'S REPLY IGNORES THAT HE STILL MUST SHOW PREJUDICE FOR ANY VIOLATION

An alien bears the burden of proving prejudice. See United States v. Proa-Tovar, 975 F.3d 592, 585 (9th Cir. 1992) (en banc). To show prejudice, the alien must demonstrate that he had "plausible grounds for relief from deportation." United States v. Arce-Hernandez, 163 F. 3d 559, 563 (9th Cir. 1998). Put differently, he "must show that 'a direct appeal could . . . have yielded a different result.'"

United States v. Corrales-Beltran, 192 F.3d 1311, 1318 (9th Cir. 1999). It is not enough to show that a procedural requirement was not complied with, or that an alien would have availed himself of missing procedural protections; the alien must "produce some concrete evidence indicating that the violation of a procedural protection actually had the potential for affecting the outcome of his or her deportation proceedings." United States v. Cerda-Pena, 799 F.2d 1374, 1379 (9th Cir. 1986); see also United States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996).

Assuming he was eligible for voluntary departure, without even looking at his equities, he cannot show prejudice. As stated in Galicia-Gonzalez, stipulated removals **cannot** be challenged on the basis that a hearing before an immigration judge might have shown the alien was eligible for relief from removal. Galicia-Gonzalez, 997 F.2d at 604 ("Even if a hearing had been held, it would have accomplished nothing, because defendant had given up the game by conceding he was deportable. Defendant therefore cannot show prejudice under Proa-Tovar.").

Even if Defendant had not "given up the game," he has the burden of showing that the Attorney General would have exercised his discretion in favor of granting relief. See United States v. Gonzalez-Valerio, 342 F.3d 1051, 1056 (9th Cir. 2003). In determining whether to grant such relief, the BIA balances "the social and humane considerations presented in an alien's favor against the adverse factors evidencing his undesirability as a permanent resident." Matter of Roberts, 20 I. & N. Dec. 294, 298 (BIA 1991). These considerations include the following:

> Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. Id. at 584-85. Among the factors deemed adverse to an alien are the nature and underlying circumstances of the exclusion or deportation ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Id. at 584. Moreover, one or more of these adverse considerations may ultimately be determinative of whether section 212(c) relief is in fact granted in an individual case. Id.
>
> As the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. Id. at 585.

Matter of Roberts, 20 I. & N. Dec. at 298-99 (listing considerations); see also Kahn v. INS, 36 F.3d 1412, 1414 (9th Cir. 1994). If an applicant has a pattern of serious criminal activity, he must demonstrate "unusual or outstanding equities" in order to receive discretionary relief. Gonzalez-Valerio, 342 F.3d at 1056-57.

Defendant has presented no evidence of favorable equities. On the other hand, there are many unfavorable equities making relief implausible. Defendant's residence in the United States was less than 18 years. Defendant introduced no evidence of family in the United States. He showed no hardship. Defendant has no history of employment or property. Defendant did not prove any level of good character. By entering the country within inspection, Defendant showed no respect for the immigration laws. In the end, there are no favorable equities, there are many unfavorable equities, and there are no plausible grounds for relief.

IV

CONCLUSION

For the foregoing reasons, the United States asks that the Court deny Defendant's motion and limit further motions to those based on new law or facts.

DATED: June 19, 2008

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NICOLAS CESAREO, Defendant.	Criminal Case No. 08CR0201-W **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, CHRISTOPHER ALEXANDER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' Supplemental Response to Defendant's Motion to (1) Dismiss Due To Invalid Deportation, together with statement of facts, memorandum of points and authorities on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Zandra Lopez, Esq.
   Atty for Defendant

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 19, 2008.

s/Christopher M. Alexander
CHRISTOPHER M. ALEXANDER